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IN THE

Supreme Court of the United States

October Term, 1968

No. ~~1500~~ 234

HENRY J. CZOSEK, *et al.*,
Petitioners,

v.

JOHN R. O'MARA, GEORGE McCORMICK, JULIUS PACKARD, WALTER DALY, and ERIE LACKAWANNA RAILROAD COMPANY,
Respondents.

BRIEF OF RESPONDENT, ERIE LACKAWANNA RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF OF RESPONDENT, ERIE LACKAWANNA RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Questions Presented

Respondent does not take issue with petitioners' formulation of the questions presented for review as expressed in numbers two and three on pages two and three of its petition. However, respondent feels that question number one as phrased below more clearly defines the issues relevant to that part of the petition in this Court.

1. Is the employer a necessary party in a suit brought by railroad employees against their railroad for alleged wrongful discharge and their union for alleged breach of its duty of fair representation where plaintiffs have not attempted to pursue their administrative remedies breach of its duty of fair representation where plaintiffs have not attempted to pursue their administrative remedies to the National Railroad Adjustment Board, even though they could have done so individually, and the employer's action was neither a consequence of the union's alleged discriminatory conduct nor was there any allegation of joint discrimination against the employees by the railroad and the union?

ARGUMENT

The Court of Appeals was correct in sustaining the District Court's order dismissing the complaint as to the employer-railroad.

Respondent agrees with petitioners' basic contention that the District Court was correct in dismissing the complaint as to all the defendants. However, respondent cannot agree that it is a necessary party to an action by a group of employees against their union for breach of its duty of fair representation.

In essence, the Court of Appeals construed the complaint to contain two separate and distinct causes of action:

(1) the furlough of plaintiffs by the railroad in violation of an "Implementing Agreement" between the railroad and its employees represented by defendant union; and

(2) a breach of the duty to represent fairly, without "hostile discrimination," all workers within a bargaining unit. (*O'Mara v. Erie Lackawanna Railroad Company*, 407 F. 2d 674 (1969)). In dismissing the first part of the complaint as against the railroad, the Court of Appeals pointed

out that a dispute of this nature fell within the primary jurisdiction of the National Railroad Adjustment Board, 45 U. S. C. Section 153 First (i) and, under such circumstances, the employees cannot maintain their action against the employer without first showing that they have exhausted their remedy before the Board. However, as to the second cause of action against the union alone, the Court of Appeals felt that the complaint was sufficient to state a cause of action against those defendants. Nonetheless, that Court granted leave to plaintiffs to amend their complaint, if they were so able, to allege a cause of action against the railroad on the basis of joint discrimination with the union. Therefore, barring amendment of the complaint by plaintiffs, what remains is a suit by employees against their union for "hostile discrimination."

In reaching its decision, the Court of Appeals did not make any determination as to the measure of damages to be recovered in a hostile discrimination suit. Consequently, it is not fair to say that the Union, as suggested by petitioners, if it should be held liable to the plaintiff, would be required to assume the employer's burden of damages. Such damages or relief could well take the form of an order of the Court requiring the Union to represent the plaintiffs in their claim against the railroad, and/or money damages, directly attributable to the union's breach of duty if plaintiffs can establish such.

Considering the fact that the Courts below in the instant case have been dealing with two separate and distinct causes of action, the decision of the Court of Appeals does not conflict in any way with applicable decisions of this Court or those of the Court of Appeals of other circuits. Unless this Court is prepared to abolish the doctrine of exhaustion of administrative remedies as expressed in

Republic Steel Corp. v. Maddox, 379 U. S. 650 (1965), the decision in the instant case must stand. In the recent case of *Glover v. St. Louis-San Francisco Railway Co.,* ___ U. S. ___, 89 S. Ct. 548 (1969), this Court reaffirmed the vitality of the *Maddox* doctrine. There, the Court pointed to some exceptions to the exhaustion requirement. After quoting from *Vaca v. Sipes,* 386 U. S. 171 (1967), the Court specifically referred to some of the exceptions to the exhaustion requirement as expressed in *Vaca.* These were:

(1) situations where the employer's conduct amounts to a repudiation of the contractual procedures; and

(2) cases where the union has the sole power to process the grievance. 386 U. S., at 185, 87 S. Ct., at 914.

In *Glover,* the Court added another exception, to wit: occasions where it would be futile to proceed formerly with the administrative remedies.

In the case at bar, there is no allegation or showing—indeed not even a suggestion—that any of these exceptions are applicable. Consequently, the thrust of petitioner's argument is that this Court should carve out another exception and relieve a party from the duty of pursuing his administrative remedies in accordance with the *Railway Labor Act* by the simple expedient of adding a cause of action against its union for a breach of its duty of fair representation, regardless of the substantiality of such a claim. It is submitted that such an exception would tend to subvert the legislative intent underlying the provisions of the *Railway Labor Act,* 45 U. S. C. Section 151 *et seq.,* which provides a precise procedure for the handling of minor disputes between railroad employees and their employers.

Conclusion

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Complaint

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN R. O'MARA, *et al.*,

Plaintiffs,

vs.

ERIE LACKAWANNA RAILROAD COMPANY, *et al.*,

Defendants.

Civ-1967-30

FIRST: At all times hereinafter mentioned, Plaintiffs were and are citizens of the State of New York and the Defendant, Anthony E. Matz is a Citizen of the State of Pennsylvania and the Defendant, International Brotherhood of Firemen and Oilers is a membership association having its principal place of business in a State other than New York. The matter in controversy exceeds, exclusive of interest and Costs, the sum of Ten Thousand Dollars ($10,000.00).

SECOND: The action arises under the Interstate Commerce Act 49 USCA Sect. 5 *et seq.* The matter in controversy exceeds, exclusive of interest and Costs, the sum of Ten Thousand Dollars ($10,000.00).

THIRD: This action arises under the Railroad Labor Act, 45 USCA Sect. 151 *et seq.* The matter in controversy ex-

ceeds, exclusive of interest and Costs, the sum of Ten Thousand Dollars ($10,000.00).

FOURTH: Plaintiffs herein were members of Local No. 826, System Federation No. 78 and System Council No. 2 of the International Brotherhood of Firemen and Oilers in the year 1962 and for a number of years prior thereto.

FIFTH: Plaintiffs herein were employed as stationary engineers of the Delaware, Lackawanna and Western Railroad in the year 1960 and for some years prior thereto and at the time of the merger of the Erie Railroad and the Delaware, Lackawanna and Western Railroad was authorized by the Interstate Commerce Commission in September of 1960; Plaintiffs continued in their employment for the newly formed Erie Lackawanna Railroad Company.

SIXTH: The Plaintiffs remained in said employment until June 1962 when they were furloughed and never recalled having been replaced by "pre-merger" employees of the Erie Railroad.

SEVENTH: The furloughing of the Plaintiffs by the Erie Lackawanna Railroad Company in 1962 and their subsequent replacement, was in effect, a termination of the employment relation by way of a discharge.

EIGHTH: The wrongful discharge of the Plaintiffs was a direct result of the merger of the Delaware, Lackawanna and Western Railroad Company and the Erie Railroad and in contravention of the Interstate Act 49 USCA Sect. 5 *et seq.;* the Plaintiffs have received no compensation from the Erie Lackawanna Railroad Company as a result of their loss of employment.

NINTH: The discharge of the Plaintiffs was a result of the merger of the Delaware, Lackawanna and Western

Railroad Company and the Erie Railroad in contravention of the Implementing Agreement between the Erie Lackawanna Railroad Company and its employees represented by System Federation No. 78 and System Federation No. 100, supplementing and implementing the Act 49 USCA Sect. 5 *et seq.;* the Plaintiffs have received no compensation from the Erie Lackawanna Railroad Company as a result of their loss of employment.

TENTH: That contrary to the Railroad Labor Act, 45 USCA Sect. 151 *et seq.* the Defendant Erie Lackawanna Railroad Company not only failed to give Plaintiffs thirty (30) days written notice of intended change in working conditions, but also failed to give any notice of said change.

ELEVENTH: That the Plaintiffs repeatedly requested the Defendant International Brotherhood of Firemen and Oilers and its president, Anthony E. Matz, Defendants, Systems Council No. 2, System Federation No. 78 and System Federation No. 100 and their general chairman, Fred R. McKernan, and Defendant, Local No. 826 and its chairman, Henry J. Czosek, to process their claims against the Erie Lackawanna Railroad Company and the aforementioned union, its officers and affiliates have been guilty of gross nonfeasance and hostile discrimination in their arbitrary and capricious refusal to process said claims, all to the detriment and damage of Plaintiffs.

TWELFTH: That the Defendant International Brotherhood of Fireman and Oilers and its president, Anthony E. Matz, Defendants System Council No. 2, System Federation No. 78, System Federation No. 100 and their general chairman, Fred A. McKernan, and Defendant Local No. 826 and its chairman, Henry J. Czosek, have breached their duty and have discriminated against the rights of the Plaintiffs, by violating the express and implied terms of the

collective bargaining agreement in effect by not representing the Plaintiffs fairly and impartially in the Plaintiffs loss of employment and the resulting loss of compensation therefrom.

THIRTEENTH: Plaintiffs demand a trial by jury on all issues presented herein.

WHEREFORE, Plaintiffs demand judgment against Defendant Erie Lackawanna Railroad Company or, International Brotherhood of Firemen and Oilers or Anthony E. Matz, System Council No. 2, System Federation No. 78 and System Federation No. 100, or Fred R. McKernan or, Local No. 826 or Henry J. Czosek, or against all in the sum of One Hundred Sixty Thousand Dollars ($160,000.00) and Costs and for such other and further relief as this Court deems just and proper.

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